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RACE, DIVERSITY, AND JURY COMPOSITION: BATTERING AND BOLSTERING LEGITIMACY

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The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.¹

INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to trial "by an impartial jury."² The apparent simplicity of the impartiality requirement is deceptive, and the quest for procedures that will fulfill the guarantee of an impartial jury has generated heated controversy.³ Although courts have recognized the importance of both the fact and the appearance of impartiality, they have struggled with mixed success in achieving those goals. The racial composition of the jury has been a primary focus in the debate and it has been a lightning rod for criticisms of several jury verdicts in high-profile cases. In this Article, we provide evidence for the importance of the racial composition of the jury as one salient form of diversity, but argue that a broader perspective on heterogeneity offers the greatest promise for promoting jury impartiality and meeting other constitutional and statutory demands.

Part I analyzes the meaning of impartiality and the obstacles that threaten efforts to achieve the ideal of impartiality. It shows that

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1. *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

2. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .").

3. See, e.g., Avern Cohn & David R. Sherwood, *The Rise and Fall of Affirmative Action in Jury Selection*, 32 U. MICH. J.L. REFORM 323 (1999).

both the concept and the reality of strict juror impartiality are flawed and offers a more realistic version of impartiality that recognizes how jurors (and others) process information and reach judgments. Part II considers the costs that may be imposed when the promise of impartiality appears to be violated. We present the evidence from a new study that demonstrates how jury composition can influence both the perceived fairness of the trial and the perceived accuracy of the jury's decision. Part III evaluates the variety of jury selection systems that courts and scholars have considered in an effort to ensure that juries are impartial, showing that each either fails to pass constitutional muster or imposes costs that make it bad policy. Finally, Part IV describes a simplified, multimethod approach that is designed both to avoid the constitutional roadblocks that some of these proposals and policies have encountered and to offer the promise of increasing the appearance and reality of impartial juries.

I. THE IMPARTIAL JURY AND THE FAIR CROSS-SECTION REQUIREMENT

According to one early image of the jury, jurors "should be as white paper."⁴ This picture of an empty page comports with the promise of impartiality: a hypothetical juror who has no prior expectations or beliefs about the world, let alone the particular facts of the case, should have no predisposition to favor one side or another. Courts, as well as legal scholars and social scientists, recognize that this extreme form of hypothetical "blank slate" juror is fanciful.⁵ Indeed, if such potential jurors did exist and courts found them to be desirable, there would be little justification for having multiple jurors on a jury. Jurors would be completely fungible and a jury of twelve or six or even two would be unnecessarily duplicative.

A less extreme model of the impartial jury recognizes that jurors come to the courthouse with a variety of beliefs and experiences, but assumes that each juror who is selected to decide the case will put aside any biases, group allegiances, or predispositions in order to decide a case fairly and impartially. During jury selection, prospec-

4. *Mylock v. Saladine*, 96 Eng. Rep. 278, 278 (K.B. 1764).

5. Although some scholars complain that courts in high-profile cases seek jurors who have lived under a rock and as a result are totally unaware of media coverage in those cases, such jurors are not genuinely blank slates: they share an unusual resistance to the ordinary events to which most prospective jurors attend. Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631 (1991).

tive jurors who are unwilling to promise to put aside any biases or prejudices and decide the case solely on the evidence presented at trial are excused. If those who remain were indeed without predispositions, the jury would then be composed of impartial jurors. This model of the jury thus assumes that an impartial jury is made up of jurors who either have no relevant biases or can lay those biases aside. How closely real juries can match this image of the impartial jury, or whether such a match is even desirable in a real jury, depends upon what is meant by bias. While some biases clearly represent inappropriate prejudices (e.g., racial animus), the characterization of other potential prejudices and biases is unclear. Where should the line be drawn between acceptable ordinary differences in expectations and reactions based on experience, and unacceptable prejudice or bias that leads to misusing or ignoring evidence?

Suppose that a juror believes that many people bring unjustified claims to court in order to collect money that they are not really entitled to receive. The juror carefully scrutinizes the testimony of the plaintiff and is easily convinced that the plaintiff is exaggerating the pain she suffered in an automobile accident. Another juror, whose brother has been suffering from a soft tissue injury that has left him with severe pain, is more inclined to believe that an accident that fails to produce extensive damage to the vehicles can nonetheless cause serious injury and is thus more inclined to believe the plaintiff's testimony. Is either juror allowing prejudice or bias to affect their judgment, or are they merely reflecting beliefs and values—that is, the personal experiences and common-sense knowledge about the world—that typical jury instructions tell them to apply in their role as jurors?⁶

Now assume instead that the witness is a police officer and the juror is more or less inclined to believe the testimony based on beliefs about the police or personal observations of police behavior in the past. Prejudice? Bias? Relevant experience and common sense? If beliefs about the world and preconceived notions about the likely credibility of particular witnesses affect juror reactions to the evidence at trial, as they surely do,⁷ such jurors cannot qualify as ideal

6. See, e.g., ARIZ. R.A.J.I. CIV. 6 (3d ed. 1997) ("Consider all of the evidence in the light of reason, common sense, and experience.").

7. See, e.g., Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301 (1998); V. L. Smith & C. Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge on Crime Categories on Fact-finding*, 20 LAW. & HUM. BEHAV. 517 (1996).

impartial jurors if that ideal assumes that jurors will lack or fail to draw on such background experiences and beliefs.

If we move from the hypothetical impartial *juror* to an impartial *jury*, we can construct a more coherent version of impartiality. The impartial jury can emerge from a set of individual jurors who inevitably carry expectations, beliefs, and experiences that predispose the individual jurors to reject particular arguments or find particular types of evidence persuasive. This version of the impartial jury is a group enterprise in which varying individual expectations, beliefs, and experiences are shared, counterbalanced, and merged within the group. According to this merger model, the impartial jury is created from jurors who individually cannot be characterized as strictly impartial, but who as a whole create a balanced and impartial jury, a jury that is composed of jurors with varying backgrounds and experiences. Indeed, one rationale for the jury is that the institution takes advantage of multiple citizens with diverse backgrounds, relying on them to pool their varying perceptions to arrive at a verdict that comports with common (i.e., shared) sense. Unlike a trial court judge, the jury can draw on this pool of experience in analyzing the evidence and reaching a verdict. In 1975, the United States Supreme Court in *Taylor v. Louisiana* explicitly recognized that impartiality is a group rather than an individual characteristic and found that the Sixth Amendment requirement of impartiality requires that the jury be drawn from a representative cross-section of the population.⁸ Tying the Sixth Amendment to selection procedures and exclusions governing the production of the venire, rather than linking it to the specific composition of the particular jury,⁹ the Court in *Taylor* and

8. 419 U.S. 522, 528-30 (1975). The Court on other occasions, however, has reverted to images of an impartial *juror*. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

9. In 1965, before the Supreme Court held that the Sixth Amendment applied to state criminal trials, the Supreme Court considered the role played by peremptory challenges in the process through which a petit jury is selected. In *Swain v. Alabama*, the defendant appealing his conviction claimed that the prosecutor had used peremptory challenges to systematically eliminate African American jurors from the petit jury. 380 U.S. 202, 203 (1965). The Court found no violation of the Fourteenth Amendment, ruling that a violation of the Equal Protection Clause could not be found based on a pattern of jury strikes in a single case. *Id.* at 224.

The Court dramatically shifted its position in 1986, promising a direct confrontation to racially unrepresentative juries. In *Batson v. Kentucky*, the Court addressed a defendant's claim that prosecutors used peremptory challenges to systematically remove African American jurors from his petit jury. 476 U.S. 79, 82-84 (1986). This time the Court found a violation of the Equal Protection Clause of the Fourteenth Amendment, overturning the defendant's conviction based on the prosecutor's use of peremptory challenges to systematically eliminate African

cases that followed¹⁰ avoided an important practical problem with the representative ideal: a small sample of twelve or fewer, even one that is randomly drawn, and particularly one that is molded by excuses for cause and peremptory challenges, is unlikely to mirror the composition of the community on race, ethnic background, and gender, let alone the myriad of other characteristics that might influence or appear to influence predispositions. Moreover, by not endorsing a particular allocation of seats on the jury to members of a particular group, the Court avoided the lure of a legislature-like jury drawn from, and potentially beholden to, particular parts of the community.

In the years since *Taylor*, some scholars and courts have struggled to identify practical ways to manage the juror selection process that are consistent with the fair cross-section requirement of the Sixth Amendment; but those efforts have encountered some serious obstacles. We will return in Part IV to the issue of how improvements that are consistent with both constitutional and practical demands can be implemented. Before turning to remedies, however, we consider the potential costs that may be imposed when the constitutional goal is not met.

II. THE COSTS OF UNREPRESENTATIVE JURIES

If diversity on the jury enhances its ability to consider a variety of perspectives in evaluating the evidence at trial, that ability is reduced

American jurors from the trial jury. *Id.* at 96–98. Several cases since *Batson* have extended its applicability to criminal defendants who use peremptory challenges to eliminate jurors based on race, *Georgia v. McCollum*, 505 U.S. 42, 47–48 (1992), to White criminal defendants arguing against the elimination of African American jurors, *Powers v. Ohio*, 499 U.S. 400, 406–08 (1991), and to jury selection in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

Batson and its progeny have failed to live up to their promise. Critics complain that peremptory challenges are still regularly used to eliminate jurors because of their race and/or their gender, as Justice Marshall predicted in his concurring opinion in *Batson*, 476 U.S. at 102–03. In an analysis of virtually all federal and state civil and criminal cases published between April 30, 1986 (when *Batson* was decided) and December 31, 1993, Kenneth Melilli found that a large majority of *Batson* challenges (82%) were unsuccessful because courts accepted race-neutral explanations, however flimsy, to justify challenged peremptory strikes. Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996); see also Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704 (1995); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Karen M. Bray, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 UCLA L. REV. 517 (1992); Shari Seidman Diamond, Leslie Ellis, & Elisabeth Schmidt, *Realistic Responses to the Limitations of Batson v. Kentucky*, 7 CORNELL J.L. & PUB. POL'Y 77 (1997).

10. *Holland v. Illinois*, 493 U.S. 474, 480–81 (1990); *Lockhart v. McCree*, 476 U.S. 160, 173 (1986); *Duren v. Missouri*, 439 U.S. 357, 363–64 (1979).

when juries fail to reflect the diversity in the community from which they are drawn. Lost are the differing life experiences and potentially differing expectations and predispositions that can influence the assessments of the evidence, including judgments about witness credibility, that characterize the impartial jury described in Part I. But an additional cost can arise if juries fail to reflect a fair cross-section of the community. Regardless of any direct effects on verdict, unrepresentative juries potentially threaten the public's faith in the legitimacy of the legal system and its outcomes.

What is the evidence that a failure to achieve racially representative juries affects perceptions of fairness? We have seen observers blame unpopular verdicts in past well-publicized cases on the failure of those juries to represent their communities accurately. In these cases, the focus has been primarily on race, implicating it, either explicitly or implicitly, as a salient feature. In the Rodney King police brutality case, race emerged in the circumstances surrounding the beating; in the O.J. Simpson case, race was emphasized in the way the case was presented to the jury. Many believe that the racial composition of the jury in these cases negatively affected both the juries' decision-making processes and the legitimacy of the verdicts.¹¹ Acquittals are not the only cases that have prompted such reactions. In another instance, some observers pointed to the ethnic make-up of a roughly half-Hispanic jury that convicted an Hispanic defendant and sentenced him to death as an indicator of the fairness of the sentence.¹² These highly publicized, unpopular trials of course have additional features that may make them unrepresentative of standard trial fare—allegations of police brutality for acts captured on videotape or a celebrity defendant in a televised trial—but they may also reflect a larger cost incurred by the legal system when juries fail to reflect a fair cross-section of their community.

One indicator that such impressions are widespread, or at least that the well-publicized trials have had substantial spillover effects, is

11. See, e.g., Deborah A. Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161; Kenneth J. Garcia, *O.J. Verdicts Put Focus on Racial Divide: Blacks, Whites Still at Odds Over Case*, S.F. CHRON., Feb. 12, 1997, at A1; Maria Alicia Gaura, *Race Never an Issue in Gremminger Trial, Juror Says*, S.F. CHRON., Nov. 8 1997, at A15. But see Vincent J. Schodolski & V. Dion Haynes, *Simpson Decision 'Easy', Race Still at Issue as Black Alternate Assails Case*, CHI. TRIB., Feb. 11, 1997, at 1 (reporting that many of the jury members for the Simpson trial did not feel that race played a factor in their decision).

12. James Orenstein, *In this Death Penalty Case, the Choices Were Too Few*, N.Y. TIMES, June 17, 2001, § 4, at 15.

a telephone survey of California residents conducted in 1995 in the wake of the O.J. Simpson trial.¹³ Respondents were questioned about their perceptions of the criminal justice system. Over three-quarters (79%) agreed that the racial makeup of the jury should reflect the racial makeup of the community and two-thirds (67%) agreed that the “decisions reached by racially diverse juries are more fair than decisions reached by single race juries.”¹⁴

The U.S. Supreme Court has recognized that the jury not only provides a forum for the resolution of disputes between parties, but also plays a legitimizing role for the legal system. To the extent that the jury legitimizes the verdict to the public, it builds public confidence in the legal system as a whole.¹⁵ For example, in *Taylor* the Supreme Court wrote:

Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.¹⁶

In its opinion in *Batson*, the Court discussed the effect representativeness can have on perceptions of the legitimacy of the legal system as a public institution: “In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”¹⁷

A. Procedural Justice Concerns

Why should representative juries and the verdicts they render be perceived as more legitimate than unrepresentative juries and their verdicts? Research on procedural justice can help explain the mechanism through which the racial composition of juries can affect perceptions of those juries and their verdicts. Thibaut and Walker, in their seminal work on procedural justice, showed that the level of

13. Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL’Y & LAW 645 (1997).

14. *Id.* at 662, 665, tbl. I.

15. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Taylor v. Louisiana*, 419 U.S. 522 (1975); Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries through Community Representation*, 52 VAND. L. REV. 353, 361 (1999).

16. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

17. *Batson*, 476 U.S. at 99.

satisfaction people feel with the decision of a trier of fact is strongly influenced by their perceptions of the fairness of the procedures used by the trier to reach that decision.¹⁸ That is, even when actual outcomes were held constant and even when those outcomes were negative, the perceived fairness of the procedures strongly influenced the party's satisfaction with the verdict and willingness to accept the legitimacy of the decision.¹⁹ These and more recent studies of procedural justice show that people are more willing to accept decisions²⁰ and to adhere to agreements over time²¹ when they perceive those decisions as having been produced by fair procedures. Moreover, the authority and perceived legitimacy of the institutions that produce the decisions are enhanced when the procedures used to produce the decisions are viewed as fair, even when those decisions involved unfavorable outcomes. The comfort and positive reactions of litigants are of course important in and of themselves. But building perceptions of procedural justice has an additional important payoff: enhanced authority and legitimacy increase the likelihood that the parties will accept the jury's finding.²² The more legitimate the process is perceived to be, the more likely participants are to accept the outcome, positive or negative.

What then are the procedural characteristics that cause disputants to perceive the process of reaching a decision on their dispute as fair? Psychologists have identified several features that consistently emerge as powerful components of perceptions about the fairness of legal procedures.²³ One critical feature is neutrality, that is, did the

18. JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

19. For a description, see Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000).

20. For recent examples, see E. Allen Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993); Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995).

21. See, e.g., D.G. Pruitt et al., *Goal Achievement, Procedural Justice, and the Success of Mediation*, 1 INT'L J. CONFLICT MGMT. 33 (1990); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313 (1993).

22. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

23. See E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities, in EVERYDAY PRACTICES AND TROUBLE CASES* 177 (Austin Sarat et al. eds., 1996); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 115 (1992); see also Tyler, *supra* note 19.

decision-maker, the jury, treat the parties in an evenhanded, nondiscriminatory way?²⁴

The perception that the decision-maker is neutral, and thus that the playing field for dispute resolution is level, is a powerful element in procedural justice. Respect for the fact-finding ability of the decision-maker is not sufficient. Honesty, unbiased treatment, and consistency are also requirements if an authority is to be perceived as neutral. Most legal systems recognize the importance of apparent neutrality in their proceedings. Judges, for example, are required to recuse themselves from cases in which they have a conflict of interest, such as stock ownership in one of the parties. Disqualification is mandatory for conduct that calls a judge's impartiality into question.²⁵ Jurors may be questioned extensively during voir dire on the grounds that such investigation is necessary to ensure that none harbor any strong biases for or against either party. If such a bias is exhibited by a juror, and the juror states that he or she will not be able to set aside the bias, the juror is struck for cause. Nonetheless, a variety of features can undermine the appearance, if not the fact, of neutrality.

A jury can fail to appear neutral if an observer questions whether the jurors will be able to consider the perspective and experiences of the defendant. The Supreme Court has written that due process is denied by circumstances that give the appearance of bias²⁶ or the probability of unfairness²⁷ as well as by actual bias.

Why would a litigant want someone with similar perspectives and experiences on the jury? In general, the strongest predictors of jury verdicts are the weight of the evidence and the applicable law, but they are not the only influences. The judgments of juries and even highly educated professionals are influenced by psychological factors that affect how they view evidence and how they reach decisions. As a result, in a close case, these factors can influence outcomes, albeit quite unconsciously and without any intentional distortion. One common psychological source of influence is an affinity effect, which arises from the tendency to share the perspective of those who come

24. Additional features that can influence perceptions of the fairness of a procedure include "voice," that is, the opportunity to make sure the concerns of the litigants are heard, trust that all relevant facts and issues will be appropriately considered, and treatment with respect and dignity.

25. See 28 U.S.C. § 455(a) (2000); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 783 (3d Cir. 1992).

26. *Peters v. Kiff*, 407 U.S. 493, 502-03 (1972).

27. *In re Murchison*, 349 U.S. 133 (1955).

from a similar background and have had a similar set of prior experiences.

Affinity effects occur when decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding and judgments of the behavior they must consider in reaching their decisions.²⁸ Whether or not we call it bias, a shared cultural background can foster an unconscious shared perspective that would be perceived as bias by an observer from a different cultural background. Whatever the label, however, the result is an advantaging of one juror over another or a tendency to see a litigant or a witness with a particular background as more or less credible than a litigant or a witness who has a different background.

A purely rational perspective might anticipate that the satisfaction of participants to a dispute would be determined exclusively, or at least primarily, by the objective outcome of the dispute: did they win? Yet research on procedural justice reveals that judgments about the fairness of procedures can affect how participants react to the outcomes they receive.²⁹ Consider the now-classic scenario in which the defendant has spent time and money preparing to fight a traffic ticket in court, only to have the ticket dismissed because the ticketing police officer did not come to court. The defendant is dissatisfied despite the positive outcome because the procedure that produced the outcome was not fair.³⁰ While in some instances (like the traffic court example) a participant is dissatisfied despite a positive outcome because the procedure appears unfair, Brockner and Wiesenfeld have shown that the effect of procedure can be even more powerful when the outcome is negative.³¹

28. Ernest A. Haggard & Soia Mentschikoff, *Responsible Decision Making in Dispute Settlement*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY 277 (June Louin Tapp & Felice J. Levine eds., 1977); Soia Mentschikoff & Ernest A. Haggard, *Decision Making and Decision Consensus in Commercial Arbitration*, in LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY, *supra*, 295.

29. See, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Joel Brockner & Batia M. Wiesenfeld, *An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures*, 120 PSYCHOL. BULL. 189 (1996).

30. LIND & TYLER, *supra* note 29.

31. See *supra* note 29.

B. Current Research

As the research on procedural justice demonstrates, the identity of the decision-maker is an important influence on the perceived fairness of procedures. Thus, we can predict that a balance in the racial composition of a jury should influence the perceived fairness of the trial and the accuracy of the verdict. The empirical research discussed below provides the first direct test of the relationship between outcomes and procedural fairness in the context of jury representativeness. We investigated how jury composition can affect observers' perceptions of the fairness and legitimacy of a trial (the process) and the jury's verdict (the outcome).

Outside observers who are aware of only superficial information about a trial may use the jury's composition as a proxy for the fairness of the trial. Evidence of the use of jury composition as a proxy can be found in the numerous headlines and tag lines found in news articles and news reports that refer only to the jury's composition and verdict when reporting on a trial. In his concurring opinion in *Georgia v. McCollum*, Justice Clarence Thomas reported finding over two hundred instances of the phrase "all White jury" in a computer search of the *Chicago Tribune*, the *Los Angeles Times* and the *New York Times* during the five years from 1987 to 1991.³²

Applying Brockner and Wiesenfeld's interaction between outcome and procedure, if jury composition is perceived as an indicator of procedural fairness we would expect to find that when the outcome (the verdict) is favorable to the defendant (i.e., an acquittal in a case in which the evidence favoring a conviction is equivocal), observers will not focus on the fairness of the process (the trial). However, when the outcome is unfavorable to the defendant (i.e., a conviction), observers will turn to the procedure to justify the outcome. If the procedure is perceived as fair, the outcome will be perceived as legitimate and acceptable, but if the procedure is perceived as unfair, the outcome is more likely to be viewed as illegitimate, and therefore unacceptable.

To test whether jury composition influences how citizens view the fairness and accuracy of a jury trial, we conducted an experiment with 320 jury-eligible individuals. We approached prospective

32. 505 U.S. 42, 61 n.1 (1992) (Thomas, J., concurring).

participants in public places³³ and asked them to participate in a short survey.³⁴ For half of the respondents, the request came from a White interviewer and for half the interviewer was African American.

We handed each respondent a description of a shoplifting trial that included the race and gender makeup of the jury and the verdict. The case description was two pages in length, about the length of a newspaper summary. An African American male was accused of shoplifting a set of wrenches from a hardware store in a mall. The trial summary included testimony from a White store clerk indicating that she watched the defendant and his friend (also an African American male) from the time they entered the store because they looked suspicious. A White mall security guard testified that the defendant ran from him when he asked the defendant and his friend to stop while leaving the store and that he found the stolen wrenches in a trashcan that the defendant ran past. The summary also included testimony from the defendant, who said that his friend stole the wrenches but he, the defendant, ran because he was scared and did not want to get involved.

We created four different versions of the case, which differed only in the stated racial composition of the jury and the verdict that the jury rendered. In the first version, an all White jury rendered a guilty verdict. In the second version, a jury of eight Whites and four African Americans rendered a guilty verdict. In the third version, the jury was all White and reached a verdict of not guilty. And in the fourth version, the jury consisting of eight Whites and four African Americans acquitted the defendant. Thus, half of the respondents judged a case with a racially homogeneous jury and half judged a case with a racially heterogeneous jury. For half of them, the verdict was a

33. Those approached to participate were in or around the Denver International and Midway (Chicago) Airports, the Chicago Greyhound bus station, the Chicago Amtrak station, the area outside an Illinois Department of Motor Vehicles driver's license office in Chicago, a Chicago public park, and Chicago commuter train stations.

34. If they agreed, the experimenter handed them a survey booklet. If they refused, the experimenter thanked them for their time and departed. Two female experimenters, one White and one African American, gathered the survey data. The White experimenter distributed 164 surveys, and the African American experimenter distributed 156 surveys with approximately equal numbers in each experimental condition. Only White and African American citizens were approached for participation; participant race was verified in a section at the end of the survey that briefly assessed demographic information. One hundred sixty White citizens and 160 African American citizens participated; 164 were male and 155 were female; one person failed to indicate his or her gender in the survey.

conviction and for the other half the verdict was an acquittal.³⁵ All juries were described as half male and half female.

Participants then answered several questions regarding the fairness of the trial and the correctness of the verdict, including: How fair do you think this trial was, on a scale of one (Very Unfair) to seven (Very Fair)? How correct do you think the verdict is, on a scale of one (Very Incorrect) to seven (Very Correct)?³⁶

1. Results: Fairness of the Trial³⁷

We predicted that participants would rate a trial before a racially heterogeneous jury as fairer than a trial before a homogeneous jury. We also predicted that participants would rate the trial as fairer if it resulted in a not guilty verdict than if it resulted in a guilty verdict,

35. Racial composition was varied to explore the effects of the presence of a significant number of African Americans on the jury. The heterogeneous juries included four African Americans (of a total of twelve jurors) to reflect an ecologically valid mix. We did not include a condition in which the jury was homogeneously African American because it is highly unlikely that a jury in Chicago would be composed exclusively of African Americans, and respondents were likely to find such a racial portrait suspicious.

36. After these questions, participants were asked to indicate what the verdict was and whether they recalled anything about the composition of the jury. In response to a follow-up question, they indicated what they recalled about jury composition.

37. To determine how many respondents correctly recalled the verdict and the jury composition, participants were asked if they recalled the verdict and what they recalled about the composition of the jury at the end of the questionnaire. Eighty-nine percent (285) of participants correctly recalled the verdict; 70% (225) of participants mentioned and accurately described the racial composition of the jury either as all White or as racially heterogeneous in the appropriate condition. (The question testing recall of jury composition was open-ended because we did not want to suggest explicitly to respondents that the racial composition of the jury was a relevant basis for judging the fairness or accuracy of the jury.) Accuracy in the reporting of the jury composition did not vary by verdict ($X^2(1, N = 320) = 0.34, ns$), by jury composition ($X^2(1, N = 320) = 2.49, ns$), or by experimenter race ($X^2(1, N = 320) = 3.21, ns$). However, fewer African American than White respondents (56.9% versus 84.3%) correctly mentioned the jury's racial composition ($X^2(1, N = 320) = 26.21, p < .05$). There was no statistically significant relationship between participant race and jury composition ($X^2(1, N = 320) = 0.01, ns$), or between participant race and experimenter race ($X^2(1, N = 320) = 0.70, ns$) in accuracy of recall for jury composition.

Respondents may have failed to mention the racial composition of the jury because they did not notice it or because race is a sensitive topic and they were reluctant to indicate that they had noticed it. The rate of nonresponse to an experimenter of the same race did not differ from the rate of nonresponse to an experimenter of a different race for either White respondents or African American respondents ($X^2(1, N = 160) = 2.77, ns$ and $X^2(1, N = 160) = 1.05, ns$, respectively), suggesting that the potential racial sensitivity of the jury composition question was not the entire explanation for the lower response rate on the jury composition question from African Americans. Nonetheless, we analyzed the data in two ways to reflect the possibility that some respondents either did not attend to the racial composition of the jury or chose to ignore or avoid acknowledging it. The first analysis included all 320 respondents. The second included only those 210 who correctly recalled the jury's verdict and correctly described the racial composition of the jury. Effects of manipulated variables that were significant across both sets of analyses are described.

but that the effects of verdict on fairness ratings would be tempered by jury heterogeneity.

Overall, participants rated the trial resulting in an acquittal as significantly fairer (the mean fairness rating was 4.97) than the same trial when it resulted in a conviction (the mean fairness rating was 4.28).³⁸ Thus, participants clearly viewed a not guilty verdict more favorably than a guilty verdict for this particular set of case facts.

More importantly, however, racial composition of the jury influenced the effect of the verdict on ratings of trial fairness (see Figure 1).

38. $F(1,304) = 12.91, p < .01$. The fairness means of the respondents who correctly recalled the verdict and jury composition were 5.06 for the trial resulting in an acquittal versus 4.40 for the trial resulting in a conviction, $F(1,194) = 8.49, p < .05$.

Figure 1:

Combined Effect of Jury Composition and Verdict on Fairness Ratings, for Both Sets of Analyses.

Including all respondents ($N = 320$)

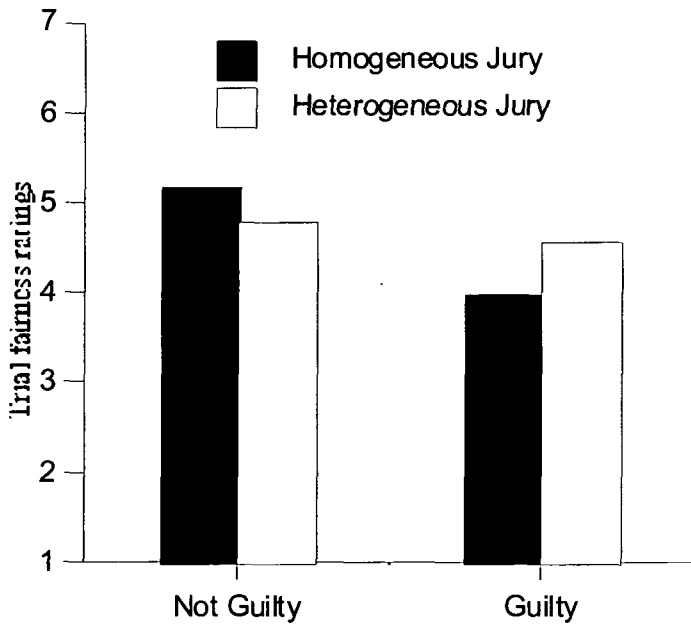
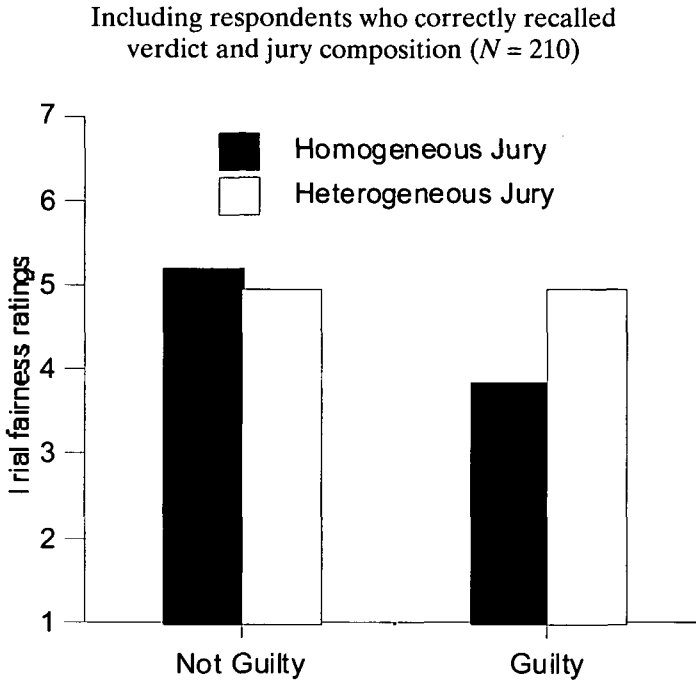


Figure 1 continued:

When the verdict was not guilty, fairness ratings for a trial with a racially homogeneous and heterogeneous jury did not differ.³⁹ However, when the verdict was guilty, respondents viewed the trial with a homogeneous jury as less fair than the trial with a heterogeneous jury.⁴⁰

2. Results: Correctness of the Verdict

We predicted that participants would rate a verdict rendered by a heterogeneous jury as more correct than a verdict rendered by a homogeneous jury. We also predicted that participants would rate a not guilty verdict as more correct than a guilty verdict, but that the effects of verdict on correctness ratings would be tempered by jury heterogeneity.

39. $F(1,158) = 2.53, p = .11$ for all respondents; $F(1,106) < 1$ for respondents who correctly recalled verdict and jury composition.

40. $F(1,158) = 3.77, p = .05$ for all respondents; $F(1,100) = 9.93, p < .05$ for respondents who correctly recalled verdict and jury composition.

As with the fairness ratings, we found that the verdict had a significant effect: the not guilty verdict was rated as more correct than the guilty verdict, with a mean correctness rating of 4.90 for an acquittal versus a mean correctness rating of 3.82 for a conviction.⁴¹ Again, an acquittal was clearly favored over a conviction. The effect of verdict on verdict correctness ratings was not influenced by the racial composition of the jury.

The robust pattern that emerged in the relationship between jury composition and verdict on ratings of the fairness of the trial is consistent with the procedural justice predictions of Brockner and Wiesenfeld.⁴² When the jury was racially heterogeneous, verdict did not influence ratings of the trial's fairness. However, when the jury did not include minority members, observers viewed the trial as less fair when it produced a guilty verdict than when it produced a not guilty verdict. Thus, the outcome, i.e., the verdict, mattered only when observers questioned the procedure that produced it, i.e., the racial composition of the jury. In fact, in response to a question asking why people found the trial fair or unfair, one respondent wrote, "Assuming he was found not guilty, he must have had a fair trial." This respondent assumed that because the outcome was favorable, the process must have been fair.

In summary, the relationship between verdict and the racial composition of the jury suggests that when the process is inclusionary (i.e., the jury is racially heterogeneous), the outcome does not influence the perceived fairness of the trial. However, when the process fails to produce a heterogeneous jury (i.e., the all-White jury), then observers are more likely to find a trial that produced a negative outcome for the defendant to be unfair. The negative effect of an outcome that is perceived to be inappropriately severe (a guilty verdict) is ameliorated when the outcome is the result of a legitimate process.

The fact that the racial composition of the jury mattered only when the jury convicted the defendant becomes even more significant when we consider criminal conviction rates. In 1996, state prosecutors reported an average national conviction rate of 86% (with a

41. $F(1,304) = 21.52, p < .05$. Means given by accurate respondents were 4.83 versus 3.82 for an acquittal versus a conviction, $F(1,194) = 11.51, p < .05$.

42. See Brockner & Wiesenfeld, *supra* note 29.

median conviction rate of 89%) in all felony cases.⁴³ Clearly, a very large majority of criminal cases results in a conviction. If the racial composition of a jury is more likely to affect perceptions of the fairness of the trial procedure when the trial results in a conviction, jury composition will be an important factor in a majority of criminal trials. Perceptions of fairness and legitimacy based on the racial composition of the jury can have a measurable effect on public perceptions of the fairness of the criminal justice system.

III. EFFORTS TO PROMOTE A FAIR CROSS-SECTION

Both courts and legal scholars have recognized the potential dangers for the legitimacy of the jury system in the face of juries that appear to be unrepresentative. While not equating a heterogeneous jury with the constitutionally mandated impartial jury, courts have acknowledged the value of a diversity of perspectives for both justice and the appearance of justice.⁴⁴ In an attempt to remedy perceived failures to achieve representative juries, some court personnel and scholars have advanced a series of proposals and policies that offer ways specifically to increase racial heterogeneity on juries.⁴⁵ These direct efforts, primarily aimed at increasing the number of African American jurors, range from explicitly selecting jurors for a trial based on their race and gender in order to achieve a particular race and gender distribution on the jury, to sending out additional summonses or qualification questionnaires to ZIP codes containing high percentages of minority residents. The controversy over using race-conscious jury selection has prevented most jurisdictions from adopting such policies. Even assuming that no legal obstacles stand in the way of such proposals and policies, each has significant weaknesses. After describing these policy attempts and proposals, we suggest a modified approach that recognizes diversity on a variety of dimensions and is likely to avoid the objections that have defeated previous efforts.

43. Carol J. DeFrances & Greg W. Steadman, *Prosecutors in State Courts, 1996*, BUREAU OF JUSTICE STATISTICS BULLETIN 5 (1998).

44. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994).

45. Alschuler, *supra* note 9; Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985). For reviews of these and other proposals, see Forde-Mazrui, *supra* note 15; Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273 (1996).

Arguably, the most direct way to create representative juries would be to allocate slots based on juror characteristics. A jury would have to include, for example, one African-American male, one Hispanic female, etc., with the precise quota for each category to be determined by the racial and ethnic make-up of the community where the case was being tried. Most commentators agree that such a system would violate the U.S. Constitution, as well as the Jury Selection and Service Act of 1968,⁴⁶ on the grounds that a potential juror cannot be systematically or intentionally excluded from serving on a jury on the basis of race or gender. Racial and gender quotients can therefore be attacked on the ground that an otherwise eligible juror was not selected because he or she failed to fit the racial profile required to occupy the next seat on the jury.

Even if such a quota system were to be legally permissible, there is evidence that the idea of racial quotas for the jury does not resonate with a majority of the public in their assessment of how a jury should be constructed. When California respondents to a survey were asked whether "a racial quota needs to be imposed on the jury to increase minority participation," only 40% agreed.⁴⁷ Even among those who said that decisions reached by racially diverse juries are fairer than decisions reached by single race juries, the percent favoring racial quotas rose to only 52%.⁴⁸

Finally, Jeffrey Abramson has correctly identified a fatal flaw in such a representational approach to jury composition.⁴⁹ While deliberations of racially or ethnically diverse juries can be enhanced by the wealth of diverse experience the jurors bring to them, they can suffer serious losses if jurors feel they are charged with representing a particular constituency in the jury room. Legislators are expected to be responsive to the constituency that elected them. In contrast, jurors are not selected, and should not see themselves, as representatives of any specific constituency. It is significant that, unlike a legislative body, the typical criminal jury is called upon to reach unanimity.⁵⁰ Jurors must come to an agreement based on their joint

46. See 28 U.S.C. § 1861 (2000).

47. Fukurai & Davies, *supra* note 13.

48. *Id.*

49. JEFFREY ABRAMSON, *WE, THE JURY* (1994).

50. In fact, forty-eight states and the District of Columbia require unanimity in all felony trials. Only Oregon and Louisiana do not do so, and even they require unanimous verdicts in all capital trials, and Oregon requires unanimous verdicts in all murder trials. Data compiled by the National Center for State Courts, G. T. Munsterman (personal communication on file with authors).

evaluation of the evidence that they all heard and saw. They are charged with deliberating to reach a consensus, not merely voting to produce an outcome. If jurors were assigned seats on a jury that led them to view themselves as representatives of a "constituency," that role assignment would defeat the notion of the deliberative jury that the merger model of the jury envisions.

Deborah Ramirez has proposed an alternative, and somewhat more indirect, approach to achieving diversity on the jury. Each litigant would choose from the venire a limited number of jurors who would be part of the final group from which the jury would be selected.⁵¹ Such affirmative jury selection would enable the litigants to increase the likelihood that the jury will include jurors of a particular race, gender, or other characteristic that the litigant finds desirable.⁵² The potential cost of such "affirmative diversity," as Nancy King has pointed out, is that juror race might still be recognized by the jurors and other observers as a criterion for inclusion.⁵³ Moreover, any form of affirmative jury selection in the hands of the parties, to the extent that the parties can identify jurors inclined to be favorable to their side, is likely to promote the selection of more extreme jurors at the expense of the more moderate, and presumably more impartial, middle ones.⁵⁴

Courts have adopted other approaches that have altered the composition of the jury venire, avoiding a direct assault on jury selection in a particular trial. Even here, however, at least two efforts have encountered opposition. The first, which was in the federal court for the Eastern District Michigan, acknowledged that a discrepancy existed between the percentage of African Americans in the population for the area and the percentage of African Americans in the jury pool, and created a jury wheel that was more racially bal-

51. Deborah A. Ramirez, *A Brief Historical Overview of the Use of the Mixed Jury*, 31 AM. CRIM. L. REV. 1213, 1223-24 (1994).

52. Although litigants would presumably be barred from selecting jurors to be included in the panel on the basis of race, *Batson v. Kentucky*, 476 U.S. 79 (1986), they presumably could offer non-race-based explanations to their selections if called upon to provide them. Consistent with the experience of *Batson* and its progeny, an attorney inclined to use race or gender as a criterion would be able to identify an acceptable nonrace reason for each of her nominated potential jurors.

53. Nancy J. King, *The Effects of Race-Conscious Jury Selection on Public Confidence in the Fairness of Jury Proceedings: An Empirical Puzzle*, 31 AM. CRIM. L. REV. 1177, 1200-01 (1994).

54. Hans Zeisel, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165, 1167 (1987).

anced by removing 877 Whites from the jury wheel.⁵⁵ A suit from a Hispanic defendant complained that Whites (including Hispanics) were systematically removed from the pool of qualified jurors. The court agreed, finding both a violation of the Equal Protection Clause of the Fourteenth Amendment and a failure of the procedure to conform to the requirements of the Jury Selection and Service Act of 1968. In light of the reasoning of *Ovalle*, the efforts of other jurisdictions to increase racial representation using similar methods are probably similarly doomed if they are challenged. Yet a more modest two-pronged approach holds some promise for promoting representation of a fair cross-section of the community on the jury.

IV. A TWO-PRONGED APPROACH TO THE IMPARTIAL JURY

What can a court do to produce a jury selection system that avoids constitutional objections and maximizes the likelihood of producing impartial juries that represent a fair cross-section of the community? It is helpful to turn away from race and back to the words of the Sixth Amendment calling for an impartial jury. Although race is no doubt an important, or even the most salient, sign of difference in modern American society, it is only one characteristic on which people differ. If an impartial jury is one that represents and balances life experiences, a jury consisting only of law professors, male and female, African American and White, should not qualify.

But if affirmative jury composition is prohibited, two strategies remain and in fact offer greater consistency with the constitutional mandate. The first is a substantial improvement in lists like voter registration lists and other source lists from which the names of prospective jurors are drawn. The second is a regularly updated stratified and weighted random draw of juror names from the potentially eligible population. Both efforts can substantially increase the diversity and representativeness of the eligible jury pool.

A. Improving Source Lists and Follow-Up

The modern American jury is the product of a multistage selection process that typically begins with a list of potentially eligible jurors drawn from voter registration lists and often supplemented by individuals holding drivers' licenses in the general geographic area

55. See *U.S. v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998).

where the court sits. If the list has not been recently updated, it becomes less representative of the population from which it is drawn. For example, according to one estimate, a master list of voters updated every four years would exclude two-thirds of the potential jurors under the age of thirty.⁵⁶ Disproportionate losses also occur for minorities due to higher geographic mobility.⁵⁷

According to a national survey of state court administrators, an average of 12% of questionnaires are returned by the post office as undeliverable, and others are simply not returned⁵⁸ (in some areas, such as Dallas, it is as high as 20%).⁵⁹ Individuals returning the questionnaires may fail to qualify for jury service if they are not citizens or if they indicate that they cannot read or write English. Others may be excused from service if they are infirm or if they are the primary caretaker for a sick or elderly individual or for a young child. Until recently, statutory provisions excluded from jury service individuals in particular occupations (e.g., physicians, lawyers, clergy). Most states have eliminated such exemptions, and are less willing than in the past to accept occupational bases as an excuse from jury duty. Where juror pay is low (e.g., \$6 per day in Dallas) and a prospective juror works on commission or for low wages with an employer who will not pay the juror during jury duty, judges are more willing to grant an excuse for economic hardship. In some jurisdictions, the jury summons is part of the juror qualification questionnaire. In most, however, the court sends a jury summons to prospective jurors after it has determined, based on the qualification questionnaire, that they are qualified to serve. Many courts find that as many as half of qualified jurors fail to respond to the summons, although failure to respond constitutes a violation of the law. A few courts have begun to prosecute jurors for a failure to respond (e.g., New York), but most courts simply summon enough jurors to obtain a yield that will fill their needs.

The loss of prospective jurors at each stage of the qualification and summons process is not random. A comparison of the demo-

56. Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 248-49 (1994) (discussing 1986 California Jury Survey, University of California, Riverside).

57. *Id.* at 249; see also HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* (1993).

58. Robert G. Boatright, *Why Citizens Don't Respond to Jury Summonses, and What Courts Can Do About It*, 82 JUDICATURE 156, 156-57 (1999).

59. Mark Curriden, 2000, *Dallas Morning News* (personal communication on file with authors).

graphic characteristics of the adult citizenry of a geographic area with the jury pool in the court that draws from that area reveals a systematic underrepresentation of minorities, younger individuals, and those at lower income levels.⁶⁰ Thus, the selection process that occurs before the jurors enter the courtroom leaves a pool of prospective jurors that may be unrepresentative of the communities from which the jurors are drawn on a variety of relevant dimensions. Changes that would increase representativeness include use of up-to-date address lists that would reduce the impact of the greater mobility of lower-income citizens, better follow-up on nonresponses, increases in financial compensation for jurors, and greater use of and publicity for one day/one trial jury service.

B. *Weighted Stratified Random Sampling*

Although better lists would improve the ability of courts to summon a representative pool of potential jurors, they do not offer a practical solution for all sources of nonrepresentativeness. For example, hardship excuses are more likely to be granted to lower-income jurors who are more likely to have primary child care responsibilities or to have sole responsibility to care for the sick or elderly. Such jurors, therefore, will be underrepresented even if they receive a juror qualification questionnaire. A further step to increasing representativeness modifies the race-conscious approaches that the *Ovalle* decision rejected and recognizes a wider reach beyond race for the attributes involved when questions of diversity and representativeness on juries are raised.⁶¹

The system that the Sixth Circuit struck down in *Ovalle* adjusted the racial composition of potential jurors selected from the qualified jury wheel to match the racial composition reported for the relevant counties in the previous census. The procedure involved eliminating potential jurors on the basis of their race (White) and replacing them with others on the basis of their race (African American). This procedure results in a one-to-one substitution of specific jurors based on their race, violating the Equal Protection Clause. The barrier is the use of membership in a cognizable group as the basis for jury selection. The same logic would preclude privileging the qualification questionnaires of certain jurors on the basis of race or gender, or

60. FUKURAI ET AL., *supra* note 57.

61. Cohn & Sherwood, *supra* note 3, at 327–33

oversampling from districts based on their higher percentages of minority residents. An alternative non-race-based approach to increasing representativeness would recognize the variety of sources that affect whether a potential juror will qualify for and not be excused from jury duty. A court can examine the yield in various political units (such as wards, districts, or precincts), ZIP codes, or other geographic units within its jurisdiction and compare it with the representation of jurors from a particular area in the census or in the initial list of addresses of prospective jurors to whom questionnaires were sent.⁶² The use of such predetermined categorizations of people would be perfectly legitimate because they were not created expressly for the purpose of creating jury wheel lists. Which unit is most appropriate is dependent on the particular area and how the unit was created; in some areas political wards are quite small and tend to reflect community boundaries while in other areas wards are too large or small for this purpose. In some areas ZIP codes would be appropriate, in others the geographic area represented by a ZIP code would be too small and restrictive, while in others it would be too large and inclusive. The appropriate unit would be one that captures some commonality in the residents of the unit.

For example, suppose that a sample of names is drawn from the list of potential jurors and a qualification questionnaire is sent to each name on the list. If a particular political district or ZIP code X accounted for 4% of the mailed questionnaires, but only 2% of the qualified jurors who appeared in the courthouse were from district or ZIP code X, that "under-yield" would be adjusted in the next mailing. The mailed questionnaires to district or ZIP code X would represent 8% of the total mailed, with a predicted yield of 4% that would reflect the actual distribution in initial list. This approach preserves the random sampling mandated by the Jury Selection and Service Act in the federal system. It merely stratifies the questionnaire process based on past experience with differential yield on purely neutral grounds. Because prospective jurors who share the same political unit or ZIP code (or other geographic identifier) are likely to be more similar to their neighbors than those who do not live in such prox-

62. Weighting can either be based on representation in the census or in the source list of prospective jurors who receive questionnaires. The choice should depend on two factors: (1) the recency of the census and (2) the coverage and quality of the source list. The availability of demographic data by ZIP code for the first time in the 2000 U.S. Census would facilitate such a comparison. G. THOMAS MUNSTERMAN & DANIEL J. HALL, *JURY MANAGEMENT STUDY: KENT COUNTY, MICHIGAN* 4 (2003).

imity (e.g., renters may share life experiences and rental units tend to cluster geographically), a geographically balanced approach to jury selection would increase representativeness. By updating the weights based on, for example, the previous year's experience,⁶³ this system would self-correct as geographic patterns change. Moreover, the approach would affect the distribution of questionnaires only to the extent that a simple random sample failed to produce a geographically representative group of eligible jurors. If, for example, each district or ZIP code yielded qualified jurors in the same proportion at the initial list, no adjustment would be required. This might occur if each district or ZIP code was homogeneous on all relevant dimensions, or if each district or ZIP code was *similarly* heterogeneous (e.g., 25% renters).⁶⁴

A key feature of this approach is that if a minority group clusters in particular locations, the system will correct for underrepresentation of that minority. The correction would occur automatically. While at some future date integrated communities may be the norm and members of different races and ethnic backgrounds may differ less in their economic and other life experiences, in the short run a geographically based adjustment to juror yields should also yield a better representation across all types of racial and ethnic categories.

Kim Forde-Mazrui has suggested an elegant, somewhat more elaborate geographically based approach to jury selection.⁶⁵ His plan introduces a quota system that assigns each seat on a petit jury to a

63. Updating more than once a year would probably introduce unnecessary complexity because it would require an adjustment for seasonal variation (e.g., more qualified jurors who are teachers appear in the summer months when school is not in session).

64. Several jurisdictions have attempted and abandoned versions of a weighted stratified random sampling approach for various reasons. King & Munsterman, *supra* note 45, at 275. A partial use of such a system was applied in Connecticut in the Federal Court with adjusted sampling based on a comparison of the number of persons reporting (rather than the number ultimately qualified, as suggested here) to the number summoned. MUNSTERMAN & HALL, *supra* note 62, at 14. The system was applied only to geographical areas having more than 10% Hispanics, *supra* note 11, raising serious constitutional questions. It was abandoned when it failed to improve the representation of Hispanics. This outcome illustrates a limitation in the ability of geographically based weighted adjustments to increase representativeness. To the extent that geographic units are internally heterogeneous, no substantial increase in representativeness may result. Oversampling from an underrepresented geographic unit that included multiple groups of potential jurors who report at differing rates, e.g. renters and homeowners, would still oversample one group, i.e. homeowners, due to the same factors that initially produced the underrepresentation of the other group, i.e. renters, from that area. The procedure thus offers the greatest promise when used on geographic units that are internally homogeneous on characteristics that affect the likelihood that a resident will become a qualified juror.

65. See Forde-Mazrui, *supra* note 15, at 388–95.

different geographic unit, called a "jurat." The virtue of the jurat quota system is that it would ensure that the petit jury as well as the jury pool reflects the geographic distribution of the jurat. The danger, in addition to the complexity of administering such a system, is that the jurors will view themselves as representatives of the jurat, raising the same concerns that Abramson has voiced about other forms of quota jury selection.⁶⁶ Members of the jury may share backgrounds and beliefs with their neighbors, but they should not be asked, however implicitly, to be their neighborhood agent in the jury room.

CONCLUSION

The improvements in source lists and the simple geographic adjustment proposed here reflect the widespread recognition that the legitimacy of the jury and its ability to confer legitimacy on the legal system require efforts to maximize heterogeneity on the jury. As the empirical evidence presented here indicates, judgments of fairness and accuracy are influenced by the composition of the jury. Our proposal will not, however, guarantee that petit juries will reflect the heterogeneity of the jury pool. Excuses for cause may systematically remove particular types of jurors, and race still haunts the peremptory challenge, despite *Batson* and its progeny.⁶⁷ Yet one of the greatest sources of unrepresentativeness on juries can be traced to the composition of the pool of jurors available in the courthouse for jury selection. By adopting a simple and neutral system of geographic stratified random sampling, at least one major source of unrepresentative juries can be removed. This focus on heterogeneity, rather than on race, is likely to offer the most practical approach to building juries with racially diverse membership specifically and enhancing representativeness generally. Unless the Supreme Court chooses to take a stronger stand in enforcing the promise of *Batson*, which appears unlikely, efforts to ensure a representative pool of potential jurors offers the best prospect for obtaining more diverse juries. At present, that may be as far as we can go to improve representativeness and to enhance the reality and appearance of an impartial jury reflecting a fair cross-section of the community.

66. ABRAMSON, *supra*, note 49.

67. See *supra* note 9 for a discussion of *Batson* and its ineffectiveness in eliminating race-based peremptory challenges.